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No. 94-563

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

DAVID LEE DAVIS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent accepts Petitioner's recount of the opinions and judgments delivered below with the following addition:

On January 29, 1992, the Supreme Court of Ohio denied Petitioner leave to appeal the September 4, 1991 decision of the Franklin County Court of Appeals.

STATEMENT OF JURISDICTION

The entry of the Supreme Court of Ohio denying an appeal of the decision affirming Petitioner's conviction for the two weapons offenses was filed on January 29, 1992.

The January 29, 1992 decision was a final judgment on the only federal issue presented for review in the state court below. Petitioner was required to petition for writ of certiorari within 90 days after the date of that decision. Rule 13, Rules of the Supreme Court of the United States. The petition for a writ of certiorari should be refused as to all questions which address the Fourth Amendment. *See Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 436 L. Ed. 2d 328.

Petitioner's fourth question, which addresses the Sixth Amendment right to confront witnesses, was neither "pressed nor passed upon" by the Supreme Court of Ohio. This Court is without jurisdiction to consider this issue. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317 (1983).

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case with the following exceptions:

1. Respondent rejects Petitioner's claim that the trial court denied Petitioner his constitutional right to cross-examine Detective Jester.

2. Respondent rejects Petitioner's claim that Petitioner presented the same constitutional questions in his appeal of the decision affirming the reinstatement of Petitioner's conviction for carrying concealed weapons as Petitioner did in his first appeal of the decision overruling Petitioner's motion to suppress evidence.

3. Respondent rejects Petitioner's assertion that Petitioner was forbidden from presenting any fact via cross-examination.

4. Respondent rejects Petitioner's claim that he established an affirmative defense to the charges of carrying concealed weapons. At trial Petitioner presented no evidence to establish any affirmative defense statutorily defined in Ohio Revised Code § 2973.12(C)(1) or (2).

REASONS FOR DENYING THE WRIT

I.

RETRIAL IS REQUIRED OF ONLY THOSE CLAIMS WHICH RESULTED IN PREJUDICIAL ERROR IN THE ORIGINAL TRIAL.

Pursuant to 28 U.S.C. § 2106, any court of appellate jurisdiction "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." *Id. See also, Haynes v. United States*, 390 U.S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968).

When an appellate court in Ohio reverses a conviction and remands to the trial court, the court of appeals is authorized, pursuant to Ohio Appellate Rule 12(D) and Civil Rule 42(B), to order a retrial "of only those issues, claims, or defenses the original trial of which resulted in prejudicial error. . . ." *Mast v. Doctor's Hospital North*, 46 Ohio St. 2d 539, 541, 350 N.E. 2d 429 (1976). Those issues or claims tried free from error are allowed to stand. *Id. See also, State Farm Fire & Cas. Co. v. Chrysler Corp.*, 37 Ohio St. 3d 1, syllabus one, 523 N.E. 2d 489 (1988); *Charles R. Combs Trucking Inc. v. International Harvester Co.*, 12 Ohio St. 3d 241, syllabus one, 466 N.E. 2d 883 (1984); *Fields v. Dailey*, 68 Ohio App. 3d 88, 587 N.E. 2d 400 (1990). As declared in *Trauth v. Dunbar*, 5 Ohio St. 3d 68, 70, 448 N.E. 2d 1368 (1983), "error as to one issue need not attach to others."

The Franklin County Court of Appeals found prejudicial error in Petitioner's trial for possession of drugs; however, found no error in Petitioner's trial for carrying concealed weapons. The remand for "proceedings in accordance with law consistent with said opinion," therefore, authorized the trial court to reinstate Petitioner's convictions for carrying concealed weapons.

As the Franklin County Court of Appeals found below, Petitioner was not entitled to a new trial on the two carrying concealed weapon charges because he had "already been afforded his constitutional right to due process and a fair jury trial on those charges." December 30, 1993 Opinion of the Franklin County Court of Appeals, at A7, Petitioner's Appendix C.

Ohio Criminal Rule 1(B) declares that the criminal rules

> are intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure the fair, impartial, speedy, and sure

> administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay.

A second trial on claims resolved in the first and upon which no error was found would necessarily prejudice the State and frustrate the very purpose of the criminal process. The State itself is entitled to a fair process. *Cf. Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965).

II.

THE TRIAL COURT IS NOT PERMITTED TO ORDER A NEW TRIAL CONTRARY TO THE MANDATE OF THE APPELLATE COURT.

Contrary to Petitioner's assertion, the trial court below never ordered a new trial on Petitioner's carrying concealed weapons convictions. When the Franklin County Court of Appeals reversed the judgment of the trial court, the matter was scheduled to the trial court's docket by the assignment commissioner. That the assignment commissioner or the trial court referred to the scheduled date as a "trial" date did not give Petitioner the right to a new trial on the carrying concealed weapon charges which, upon appellate review were "expressly found to be free of prejudicial error." (December 30, 1993 Opinion of the Franklin County Court of Appeals, at A6, Petitioner's Appendix C).

The lower court is required to follow the appellate court's mandate on remand. *Insurance Group Comm. v. Denver & R.G.W.R.R.*, 329 U.S. 607, 612, 67 S. Ct. 583, 91 L. Ed. 547 (1947).

Assuming, *arguendo*, that the trial court did order a new trial, the court of appeals would properly reverse because that order would be in error. *American Mfrs. Ins. Co. v. Wilson-Keith & Company*, 247 F.2d 249 (8th Cir. 1957).

III.

WHERE A POLICE OFFICER CAN POINT TO SPECIFIC ARTICULABLE FACTS WHICH, TAKEN TOGETHER WITH REASONABLE INFERENCES FROM THOSE FACTS, WARRANT FURTHER INVESTIGATION OF POSSIBLE CRIMINAL ACTIVITY, THE OFFICER MAY STOP THE INDIVIDUAL.

The entry of the Ohio Supreme Court denying Petitioner's motion for leave to appeal the decision affirming Petitioner's conviction for carrying concealed weapons was filed on January 29, 1992. This decision from the Ohio Supreme Court was a final judgment on the only federal issue presented for review in the state court below. Petitioner was required to petition for a writ of certiorari within 90 days after the date of this decision. Rule 13, Rules of the Supreme Court of the United States. Petitioner did not file his petition until September, 1994. The petition should be refused. *See Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).

Assuming *arguendo*, that Petitioner is not out of rule, Petitioner's question fails on the merits.

The Fourth Amendment is not a guarantee against all searches and seizures, but only against unreasonable searches and seizures.

A police officer can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that the person has been, is, or is about to be engaged in criminal activity even if the officer lacks probable cause to arrest. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989); *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985).

In the instant case, Columbus police officers had specific, articulable facts from which to draw reasonable inferences to support their decision to make an investigatory stop of Petitioner's car.

Between April and October 1987, Columbus Police Officers assigned to the Exploited Children's Unit investigated an individual initially known to them as "Injectorman." Juvenile prostitutes in the Short North area of Columbus told the police that a middle-aged heavy-set man with scars on his stomach and dark-rimmed glasses, driving a maroon Cadillac containing guns and large quantities of drugs in vials, would pick them up on High Street, inject them with drugs, and have sex with them. Some were taken to a gun store and injected with drugs there.

On September 3, 1987, a social worker assigned to the Exploited Children's Unit observed a man fitting the description of "Injectorman" driving a maroon Cadillac in the Short North area. The social worker obtained the license number of the Cadillac. This car registered to Davis Corvette Sales and Service, a business owned by Petitioner. The police also determined that Petitioner was a Perry Township Auxiliary Police Officer and a nurse-anesthetist, formerly employed at Lancaster-Fairfield Hospital.

On October 2, 1987, Columbus police officers observed Petitioner driving his maroon Cadillac in the Short North area. The officers followed Petitioner for almost three hours while Petitioner slowly drove up and down High Street. Petitioner eventually stopped in front of a house known to be used for prostitution and spoke with a young woman, Diane Slone. Slone entered Petitioner's car and Petitioner immediately drove away. The police officers lost sight of Petitioner's car in traffic and waited at Slone's house until Petitioner returned and dropped her off. Petitioner was then stopped by the police.

The police officers properly stopped Petitioner because they suspected that Petitioner was involved in a felony. The police officers had probable cause to arrest Petitioner when, as Petitioner exited his car, one officer observed the butt of a gun under the armrest of the front seat. The search of the car incident to Petitioner's arrest led to the discovery of a second gun under the armrest and a third gun in the glove box. *See Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). That Petitioner was a gun dealer and an off-duty reserve police officer without authority to carry a gun while off-duty does not, standing alone, establish a defense to a charge of carrying concealed weapons. Ohio Revised Code § 2923.12(C).

The actions of the Columbus police officers complied with the Constitution. The motion to suppress was properly overruled.

IV.

THE SCOPE OF CROSS-EXAMINATION OF A WITNESS LIES WITHIN THE SOUND DISCRETION OF THE TRIAL COURT.

This Court does not have jurisdiction to consider this question as Petitioner did not present this issue to the Ohio Supreme Court. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

Assuming, *arguendo*, this Court's jurisdiction, Petitioner's Sixth Amendment argument fails on the merits.

The scope of cross-examination lies within the sound discretion of the trial court. *Smith v. Illinois*, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968); *Alford v. United States*, 282 U.S. 687, 51 S. Ct. 318, 75 L. Ed. 624 (1931).

While a defendant's Sixth Amendment right to cross-examine witnesses may not unreasonably be curtailed, his right is not absolute and may in appropriate cases be limited to accommodate other legitimate interest in the criminal trial process. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Walker*, 53 Ohio St. 2d 192, 374 N.E. 2d 132 (1978).

Unless the trial court abuses its discretion to the clear prejudice of the defendant, an appellate court should be slow to interfere. *State v. Hymore*, 9 Ohio St. 2d 122 (1967).

Petitioner's complaint involves one objection that was sustained by the trial court. A reading of the record reveals that the cross-examination was not unreasonably curtailed:

> Q. [by Mr. DePascale] Is it not accurate to state that you did not take these girls off the street when you knew they were engaged in prostitution?
>
> A. When we know girls are involved in prostitution we try by whatever means we can to get them off the streets. We do not arrest them for prostitution until just recently we have done that, but until recently we have not gone out to charge them with prostitution.
>
> Q. Do you know some of these teenage prostitutes were engaged in drug usage?
>
> A. We suspected they were, sure.
>
> Q. You left them on the street knowing they were engaged in prostitution and drugs?

(Appendix B, 16a-17a).

The trial court did not abuse its discretion when it sustained the prosecutor's objection to this last question which was answered previously and which inaccurately restated what the witness had said. *See Smith v. Illinois, supra.* Trial counsel made no attempt to bring out other evidence that he believed relevant.

CONCLUSION

Petitioner was afforded his constitutional rights at every stage of the proceedings below.

Respondent respectfully prays that the writ of certiorari in this matter be denied.

Respectfully submitted,

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APPENDIX A — RELEVANT STATUTES AND RULES

CODE OF THE UNITED STATES

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

OHIO RULES OF CIVIL PROCEDURE

RULE 42. Consolidation; separate trials

(A) Consolidation. When actions involving a common question of law or fact are pending before a court, that court after a

hearing may order a joint hearing or trial of any or all the matters in issue in the actions; it may order some or all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(B) Separate trials. The court, after a hearing, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, or third-party claims, or issues, always preserving inviolate the right to trial by jury.

OHIO RULES OF CRIMINAL PROCEDURE

RULE 1. Scope of Rules: Applicability; Construction; Exceptions

(A) Applicability. These rules prescribe the procedure to be followed in all courts of this state in the exercise of criminal jurisdiction, with the exceptions stated in subdivision (C) of this rule.

(B) Purpose and construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay.

(C) Exceptions. These rules, to the extent that specific procedure is provided by other rules of the supreme court or to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment,

order or ruling, (2) upon extradition and rendition of fugitives, (3) in cases covered by the Uniform Traffic Rules, (4) upon the application and enforcement of peace bonds, (5) in juvenile proceedings against a child as defined in Rule 2(2) of the Juvenile Rules, (6) upon forfeiture of property for violation of a statute of this state, or (7) upon the collection of fines and penalties. Provided that where any statute or rule provides for procedure by a general or specific reference to the statutes governing procedure in criminal actions, such procedure shall be in accordance with these rules.

OHIO RULES OF APPELLATE PROCEDURE

RULE 12. Determination and judgment on appeal

(A) Determination.

(1) On an undismissed appeal from a trial court, a court of appeals shall do all of the following:

(a) Review and affirm, modify, or reverse the judgment or final order appealed;

(b) Determine the appeal on its merits on the assignments of error set forth in the briefs under App. R. 16, the record on appeal under App. R. 9, and, unless waived, the oral argument under App. R. 21;

(c) Unless an assignment of error is made moot by a ruling on another assignment of error, decide each assignment of error and give reasons in writing for its decision.

(2) The court may disregard an assignment of error presented

for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App. R. 16(A).

(B) Judgment as a matter of law. When the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned and argued in appellant's brief and that the appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly. When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly.

(C) Judgment in civil action or proceeding when sole prejudicial error found is that judgment of trial court is against the manifest weight of the evidence. In any civil action or proceeding which was tried to the trial court without the intervention of a jury, and when upon appeal a majority of the judges hearing the appeal find that the judgment or final order rendered by the trial court is against the manifest weight of the evidence and do not find any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief, and do not find that the appellee is entitled to judgment or final order as a matter of law, the court of appeals shall

reverse the judgment or final order of the trial court and either weigh the evidence in the record and render the judgment or final order that the trial court should have rendered on that evidence or remand the case to the trial court for further proceedings; provided further that a judgment shall be reversed only once on the manifest weight of the evidence.

(D) All other cases. In all other cases where the court of appeals finds error prejudicial to the appellant, the judgment or final order of the trial court shall be reversed and the cause shall be remanded to the trial court for further proceedings.

APPENDIX B — TRANSCRIPT OF PROCEEDINGS

[Commencing at 112]

CROSS EXAMINATION

BY MR. DEPASCALE:

Q. Detective Jester, showing you what has been marked as State's Exhibit 28 for identification, and I'm going to ask you if you recognize that document?

A. It's a property slip from our property room.

Q. Was that made out in your handwriting?

A. No, it was not.

Q. Does that bear your signature?

A. No, it does not.

Q. Okay. Do you recognize the signature that's on it?

A. K. P. Justice.

Q. Was he present at the scene of Mr. Davis' arrest?

A. Yes, that's correct.

Q. He's one of the officers that was involved in searching the car?

A. That's correct.

Appendix B

Q. Showing you what has been marked as State's Exhibit 36 for identification and ask you if you recognize that?

A. Yes, that's correct.

Q. Does that document, does that document bear your signature?

[113] A. Yes, that's correct.

Q. It's in your handwriting?

A. That's correct.

Q. State's Exhibit 28, that provides the amount in the sum of $6,745 in cash. That was found in that car, was it not?

A. $6,745 was turned into the property room, yes.

Q. And State's Exhibit 36, provides for a Perry Township Police Badge, two Perry Township I.D.'s with photographs, white plastic box containing miscellaneous paperwork and warrants?

A. Yes.

Q. That also indicates that it came from the Cadillac?

A. Yes.

Q. There's also a Perry Township Police Uniform in that car, wasn't there?

A. I don't recall. I have to look back at the list of stuff that was taken out.

Appendix B

Q. All that stuff was returned to Perry Township, wasn't it?

A. Perry Township was notified to come and get it and I filled out the release that it could be released but if they came and got it I have no knowledge of.

Q. Did you make an inventory of the Perry Township [114] warrant?

A. I did not sit down and go through them. I put it in as miscellaneous paperwork.

Q. When you walked up beside Mr. Davis' car on October 2nd, your testimony was that you saw a gun through the window, how much of a gun did you see?

A. I saw a butt gun, the handle part.

Q. Did you clearly recognize that as a gun at that time?

A. That's correct.

Q. Now, I believe that your testimony to Mr. Edwards on direct examination was that you had — well, I seem to put the document some place, but I can't remember where I put it —

THE COURT: Mr. Depascale, just take your time but not too much time.

Q. (By Mr. Depascale) Your testimony to Mr. Edwards was that you had the name "injector man" before you had an idea of the suspect?

A. Yes, that's correct.

Q. That's what you said?

A. Yes, that's correct.

Q. Now, at the time that Mr. Davis' car was stopped on October 2nd — I'm sorry — yes, October 2nd, 1987, you already knew that David L. Davis was a [115] Certified Registered Anesthetist Nurse so licensed, is that correct?

A. Yes, that's correct.

Q. At that same time you knew he had a federal gun license?

A. Yes, that's correct.

Q. At the same time you knew he had an interest of some kind in Davis Guns, is that correct?

A. Yes, that's also correct.

Q. At the same time you also knew he was a Perry Township Auxiliary Officer?

A. Yes, that's correct.

Q. And you learned that when?

A. I would say sometime during the month of September.

Q. Does the date September 3rd refresh your memory?

A. I have to look at my summary to be exact.

Q. If I represent to you that you previously told me it was September 3rd, would you find that to be incorrect?

A. Depends on when I told you.

Q. In any event, it was sometime early September?

A. It was the same time when I came back to work and started back on the case on August 8th and started on [116] the arrest.

Q. Can you look at your case file, please?

A. I have to get my briefcase.

Q. If you would be so kind.

A. I couldn't see where it says September 3rd. That's the date Amy saw the car.

Q. Okay.

MR. DEPASCALE: Let the record show that the Witness has put her notes away.

Q. (By Mr. Depascale) Now, I don't want to get it confused with the others —

THE COURT: That's fine, continue.

MR. DEPASCALE: Your Honor, I'm looking for the date and

if the court can bear with me a little bit of indulgence — Okay, all right.

Q. (By Mr. Depascale) Also about that time on October 2nd, you knew that the dealer's tag was registered to Davis Corvette Sales, is that correct?

A. Yes, that's correct.

Q. Okay. Now, I'm going to show you this document, this transcript, and asked you to read to yourself here —

THE COURT: Mr. Depascale, identify what you handed her.

MR. DEPASCALE: Her previous testimony, [117] Your Honor.

THE WITNESS: I need to look at it, sorry.

THE DEFENDANT: I'm sorry, I thought you read it, you handed it back to me.

THE WITNESS: No.

THE COURT: Detective, did you review that?

THE WITNESS: Yes.

THE COURT: Mr. Depascale, you may proceed.

Q. (By Mr. Depascale) Does that refresh your memory?

A. Yes.

Q. So the correct date is on or about September 3rd?

A. It would have been after September 3rd.

Q. Directing your attention to page 55 of that transcript and directing your attention to that transcript line ten,

"Question: Okay, that's fine. At what point in time did you ascertain that prior to October 2nd that this dealer tag was registered to Davis Corvette Sales?"

Your Answer: "After September 3rd, 1987."

Were you asked that question and you gave that answer?

[118] A. That was last November, I can't remember what I was asked and what answers I gave, but that's what the transcript states. I presume so since that's what is written here.

MR. DEPASCALE: Let the record reflect this transcript is of a motion hearing we had taken by this court reporter.

THE COURT: Thank you. It will be so reflected.

Q. (By Mr. Depascale) Okay. Now, directing your attention further to page 71 of that same transcript, line four, beginning with line four:

"Question: Do you remember who coined the term 'injector man' and when it was so coined?"

Your Answer: "Renee Casper also known as Nicki Butler coined it and I think she told it to Officer Malloy on October 2nd, 1987."

Were you asked that question and did you give that answer?

A. That's what's written here; I presume that's what I said; that's the best I can answer that.

MR. DEPASCALE: If the court would be so kind; let the record please reflect this is the same transcript from the motion hearing taken by this same court reporter.

[119] THE COURT: I understand.

Q. (By Mr. Depascale) At the time you had Mr. Davis' car stopped, you had no personal knowledge he had committed any offense, did you?

MR. EDWARDS: Object, your Honor. May we approach the bench?

THE COURT: Please.

* * *

Thereupon, the following proceedings were held outside the presence and hearing of the jury but on the record:

THE COURT: Where are we going?

MR. DEPASCALE: Her testimony by affidavit in front of Judge Martin, I'm sorry, Judge Martin by virtue of affidavit by the

search warrant was that she ordered the car stopped to I.D. the driver. I intend to show that she stopped the car when he was not doing anything wrong; and I think it is relevant for the purpose of her credibility. She never knew who he was for a month.

MR. EDWARDS: You know, Judge, the problem I have with this is there's already been a motion to suppress, and at that time the defense had an opportunity to raise the issue of proper search, whether there was a misleading statement like in France v. Delaware, the argument there was the Detective misled the Judge who [120] signed the warrant.

You know what the defense is trying to do is he is kind of dropping a message to the jury that this was a bad search and that the Detective was overzealous, and that's already been ruled on.

THE COURT: Are you impeaching the credibility of the witness?

MR. DEPASCALE: Absolutely. My point is to show that this witness drafts information that is inaccurate for the purpose of grandizing (sic) herself to the jury.

THE COURT: Okay. I'll permit you to make this inquiry but limit the inquiry, okay?

MR. DEPASCALE: I don't disagree with that at all, Judge. I'm going where I intend to go and then I'll move on.

THE COURT: Okay, let's go.

* * *

Appendix B

Thereupon, the following proceedings were held in the presence and hearing of the jury and on the record:

THE COURT: You may answer the question.

THE WITNESS: He picked up a female at a location known to us to be a drug house and a house of prostitution.

[121] Q. (By Mr. Depascale) Picking up a female is not illegal, is it?

A. No.

Q. You had no personal knowledge that that female is a prostitute, did you?

A. Not at that time, no.

Q. Okay. Now, you remember the search warrant affidavit you filed with Judge Martin to get your warrant?

A. The first one or the second one? He signed them both.

Q. I don't know — let me show you. This has been marked as Prosecution Exhibit 33, and directing your attention for the purpose of my questions, the last paragraph of that document called an attachment to page two, and first of all, does that bear your signature?

A. Yes, it does.

Q. Would you be so kind as to examine the entire exhibit so we can establish that is your attachment and your affidavit you made with respect to that?

A. That is it.

Q. In that affidavit, did you state to Judge Martin that you had stopped the car to determine the identity of the driver?

A. That's correct.

[122] Q. Okay. Now, in your testimony you established on direct examination that you were working with the exploited children's unit, is that correct?

A. Yes, that's correct.

Q. And one of the things exploited children's unit deals with is juvenile prostitution?

A. Yes, that is correct.

Q. Is it not accurate to state that you did not take these girls off the street when you knew they were engaged in prostitution?

MR. EDWARDS: Your Honor, can we define what girl, you know, so —

Q. (By Mr. Depascale) All right. Juvenile prostitutes under the age of 18 before their 18th birthday?

A. When we know girls are involved in prostitution we try by whatever means we can to get them off the streets. We do not arrest them for prostitution until just recently we have done that, but until recently we have not gone out to charge them with prostitution.

Q. Do you know some of these teenage prostitutes were engaging in drug usage?

A. We suspected they were, sure.

Q. You left them on the streets knowing they were engaging in prostitution and drugs?

[123] MR. EDWARDS: Object again, your honor.

THE COURT: Sustained.

MR. DEPASCALE: May I approach the bench?

THE COURT: No. Ask the next question.

MR. DEPASCALE: Your honor, I'd like to know why?

THE COURT: Ask your next question.

Q. (By Mr. Depascale) Did you leave them on the streets knowing they were engaging in prostitution and drugs?

MR. EDWARDS: Object, your honor.

THE COURT: Sustained.

Q. (By Mr. Depascale) Was the car inventoried when it was impounded?

A. When we left the scene I can't tell you what the uniformed officer did.

Q. Your answer is you don't know?

A. I don't know, that's right. I don't know to what extent it was inventoried. I know the interior was but I don't know beyond the extent of that.

Q. So you know the interior was inventoried before you left the scene?

A. Before I left the scene?

Q. Yes.

A. A partial inventory was conducted but they were [124] still working on the car when we left.

Q. To your knowledge the whole interior of the car was inventoried before it was impounded?

A. I can only assume it was, I don't know.

Q. On direct examination you went through a fairly comprehensive list of drugs reading the labels to the prosecutor in response to exhibit numbers.

The question is do you have a personal knowledge of any of that or were you just reading the labels?

A. Reading the labels.

MR. EDWARDS: Your honor, I'm going to object. I am not sure the witness understands the question as far as did she have any personal knowledge of that, you know, your honor, I don't know the question is from her personal knowledge does she know that drug says valium is valium or what?

THE COURT: I think the witness understood the question. She answered it appropriately. Next question.

Q. (By Mr. Depascale) Between September 3rd, 1987 and October 2nd, 1987, what did you do to get positive identification on David L. Davis?

A. I'm afraid I don't know what answer you want?

Q. I believe your testimony is that you had him as [125] a suspect of some kind from an investigation?

A. Yes.

Q. What did you do to I.D. him as the correct individual?

A. You mean put a name with the face?

Q. The name with the face or name with the face — well, let me rephrase the question.

Did you go to Perry Township and try to I.D. him as the individual that was the subject of the complaint?

A. No.

Q. Did you go to the gun store and try to do that?

A. No.

Q. Did you go to 775 Riverside Drive and do that?

A. No, but I did go to the Arlington police department.

Q. When you identified the car, well, sorry — when you inventoried the car, did you find a notebook containing the description of criminal activity on that? In other words, names of individuals engaged in criminal activity in Mr. Davis' handwriting?

A. I can't answer that without my list, but I don't recall anything like that.

MR. DEPASCALE: Your honor, if I could have second, please.

[126] THE COURT: Gentlemen, will you please approach the bench.

* * *

Thereupon, a sidebar discussion was held outside the presence and hearing of the jury and off the record.

* * *

Thereupon, the following proceedings were held in the presence and hearing of the jury and on the record:

MR. DEPASCALE: Your honor, with respect to my cross examination of this witness and in accordance with the court's ruling, I am through, but as I stated at the bench there will be some stuff that I want on the record later.

Appendix B

THE COURT: Redirect?

MR. EDWARDS: No, your honor, I have no further questions.

THE COURT: Thank you, detective. That will be all. Please do not discuss your testimony with any other prospective witnesses. Thank you.

Call your next witness.

MR. EDWARDS: Your honor, can I approach?

THE COURT: Yes.

* * *

[127] Thereupon, a sidebar discussion was held outside the presence and hearing of the jury and off the record.

* * *

Thereupon, the following proceedings were held in the presence and hearing of the jury and on the record:

THE COURT: Ladies and gentlemen, at this time we will adjourn for the evening. There's one witness that the state wishes to call but there is a problem with that witness coming in this afternoon so we will recess for the afternoon.

Now, at this time I will ask you to report to the jury commissioner's office at 8:30 tomorrow morning, that is 8:30 in the jury commissioner's office. At that time the bailiff will bring you to the courtroom.

Appendix B

During the time you are absent from the courtroom please, as I have stated this before and I will state it again many more times, do not discuss the case among yourselves or if anyone approaches you to discuss the case, please let us know.

I'll see you all tomorrow morning.

* * *

Thereupon, the jury was excused for the day.

* * *

[128] Thereupon, the following proceedings were held outside the presence and hearing of the jury but on the record:

THE COURT: Go ahead, Mr. Depascale.

MR. DEPASCALE: Your honor, for the purpose of the record, during the trial I asked or I would like to proffer that I tried to ask a question and the court sustained the objection to that question, to that line of testimony with respect to Cathy Jester's activity as far as the juvenile prostitutes went who she worked with at ECU. If I was permitted to pursue that line of questioning, Cathy Jester would have testified to the following things which I consider to be extremely important for the purpose of this trial and in front of the jury, and they are as follows: We can pretty much identify our juvenile prostitutes, we know who they are, we seem them on the streets and we know if there are warrants and we talk to them to see what's going on and we know they're prostituting; but we don't arrest the juveniles or warrants or if they are missing, we have pictures of them and we know their names but we leave them on high street knowing that probably that day they will engage in prostitution and/or use of drugs.

Later on in that same — or I'm taking this all out of this transcript — so we get the information out [129] of them that they know the people will in fact lie; and then finally said even if there was a warrant on one of the juvenile prostitutes but giving her information, certainly we will not take them to jail and she does not want them arrested.

I believe Mr. Davis has an absolute right to have the jury know the answers to those questions because this can seriously affect the credibility of that witness, and the jury should have the ability to make a fair and impartial verdict in this case. Thank you.

THE COURT: Mr. Edwards, any response?

MR. EDWARDS: Judge, I wish I could, but I'm puzzled as to how that testimony is even relevant. And again I realize this is argument, that the court excluded that, but I feel the testimony is irrelevant.

THE COURT: The court has ruled on that. The court appreciates your proffer.

Is there anything further?

MR. DEPASCALE: No, your honor.

THE COURT: Okay, I'll see you all tomorrow.

* * *

Thereupon, court was adjourned for the day.

* * *